BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Yanus Patel dated June 10, 1992, alleging discrimination in accommodation on the basis of race, colour, ancestry, place of orgin & ethnic origin.

B E T W E E N :

Ontario Human Rights Commission

- and -

Yanus Patel

Complainant

- and -

Minto Development Inc.
Jeff Jones

Respondents

DECISION

Adjudicator : Deborah J.D. Leighton

Date : January 8, 1996

Board File No: 93-0015

Decision No : 96-002

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Naomi Overend, Counsel
Yanus Patel	)	Emilio S. Binavince, Counsel Caspar van Baal, Counsel
Minto Developments Inc.	)	Alan Riddell, Counsel
Jeff Jones	)	On his own behalf

IN THE MATTER OF a Board of Inquiry appointed pursuant to Section 38(1) of the Ontario Human Rights Code, R.S.O. 1990, c.H.19.

BETWEEN

ONTARIO HUMAN RIGHTS COMMISSION

- and -

YANUS PATEL — Complainant

- and -

MINTO DEVELOPMENT INC.

- and -

JEFF JONES — Respondents

DECISION

BEFORE:	Deborah J.D. Leighton, Chair
FOR THE COMMISSION:	Naomi Overend, Counsel
FOR THE COMPLAINANT:	Emilio S. Binavince, Counsel Caspar van Baal, Counsel
FOR THE CORPORATE RESPONDENT:	Alan Riddell, Counsel
FOR THE PERSONAL RESPONDENT:	Jeff Jones
HEARING:	Ottawa, Ontario

This case involves the complaint of Mr. Yanus Patel which was filed March 1, 1989, and was amended on June 10, 1992, alleging discrimination in accommodation on the basis of race, colour, ancestry, place of origin, and ethnic origin by Minto Development Inc. (the corporate Respondent) and Jeff Jones (the personal Respondent). The corporate Respondent has raised three preliminary motions to dismiss the complaint. The first motion is to dismiss the complaint for abuse of process. The second motion is to dismiss the complaint for delay. The third motion is to dismiss the complaint on the basis that the Board of Inquiry does not have jurisdiction to hear this case.

THE FACTS

The first Board of Inquiry appointed to hear this complaint on April 7, 1993, notified the parties at the first conference call on May 3, 1993, that he was acquainted with one of the employees of the corporate Respondent. On May 11, 1993, the Commission notified the Board of Inquiry and the Respondents that Mr. Patel objected to the first Board of Inquiry hearing the case. The first Board of Inquiry resigned from the matter.

I was appointed as the second Board of Inquiry and a second conference call was held on September 14, 1993, in order to set dates and address any preliminary matters that were outstanding. The first hearing into the matter went forward on May 12, 1994, to hear preliminary motions by the Respondents. A preliminary decision was issued on June 6, 1994, denying these motions and ordering that the hearings go forward on the merits on the dates that had been scheduled beginning June 14, 1994.

On June 14, 1994, several additional preliminary matters were raised when Mr. Patel objected to certain documents being disclosed to the Respondents. Counsel for the corporate Respondent had demanded disclosure as required by the decision in Re Ontario Human Rights Commission and House et al. (1993) 115 D.L.R. 4th 279 (Ont. Div. Ct.); ([1]Sub. nom. Christian, Dillon and Edward et al. v. Northwestern General Hospital et al. (#2)) (1993) 20 C.H.R.R. D/492 (Ont. Bd. of Inq.) and the Commission had forwarded the documents. The Commission took no position on whether the disclosure was improper, but Commission Counsel did make a motion on behalf of Mr. Patel and she argued based on his reasons for not wanting the documents to be disclosed. At the end of her argument Mr. Patel said that he was not sure that every argument had been made in supporting his request to have the documents returned to the Commission. He therefore requested an adjournment in order to retain Counsel. Since Mr. Patel was to be the first witness and since the question of whether these documents were admissible was the next issue, this Board granted the adjournment, over the objection of the Respondents, so that Mr. Patel could consult and/or retain Counsel. Further dates were not set at this time so that Mr. Patel's Counsel would be able to attend a conference call which was agreed to by all parties for July 4, 1994.

On July 4, 1994, Mr. Patel had not yet retained Counsel and was still in the process of doing so. This Board set September 30, 1994, to address Mr. Patel's objections to the disclosure, and set November 17-18, 24-25, 1994, to go forward with the merits of the case. This Board asked Mr. Patel to have his Counsel notify the Board of Inquiry office when he/she was retained.

On September 23, 1994, Counsel for Mr. Patel called Counsel for the Respondent corporation and indicated that there was probably no basis for objecting to the production that had been made by the Commission. He also indicated that there was probably no need for a motion or a hearing on September 30, 1994. Despite numerous letters and calls from Counsel for the corporate Respondent, Complainant's Counsel did not notify the Board of Inquiry office until after the close of office hours on September 29, 1994 that he had withdrawn his motion. The delay resulted in this Board travelling to Ottawa for the hearing.

The hearing had been set to go forward on the merits on November 17 and 18, 1994. Registrar for the Boards of Inquiry notified the Board of Inquiry late on November 16 that there may be some further need for an adjournment. The personal Respondent, Mr. Jeff Jones, was unavailable due to the death of a close family member. The Board adjourned November 17 and 18, and requested that a conference call be set up on November 17 or 18 to reschedule dates to hear the case.

A conference call was held on November 18 and after rearranging the Board's schedule, new dates were set for December 1 and 2, 1994, in order to accommodate the corporate Respondent's concern about splitting the case and so that there would be no further delay in the hearing on the merits. All parties agreed to these dates and there was no objection by the Complainant's Counsel or the Complainant to these dates being set.

Five days later, the day before the hearing was to begin on the merits for the second time, Counsel for Mr. Patel notified the Board that it "may be necessary to request an adjournment of

the hearing" because Mr. Patel was having difficulty sitting or remaining in the same position for any length of time.

When the hearing resumed on November 24, 1994, Counsel for the Complainant made a motion for an adjournment for medical reasons and provided the medical opinion of Dr. Giaccone, which was dated November 23, 1994, and provided with regard to Mr. Patel the following:

> Mr. Patel has suffered a whiplash injury and has a number of cognitive difficulties. He is complaining of difficulties concentrating for long periods of time, and difficulties speaking in public. He has had in-depth neurological testing which indicated some mild impairment of memory consistent with defects in the patients with closed head injury.
>
> On assessment of personality, he was found to have considerable psychological distress manifested by depression and anxiety.
>
> It is likely that his symptoms will gradually improve and his somatic complaints should resolve themselves. At the present time I think it would be advisable for Mr. Patel to avoid any excessively stressful situations such as a court hearing.

This letter was signed by "K. Asseck," for Dr. Giaccone. Counsel for the Complainant indicated that the whiplash and closed head injury were due to a car accident which Mr. Patel had suffered.

Over the strenuous objections by the corporate Respondent's Counsel, this Board granted the adjournment based on medical reasons. After granting the adjournment, Counsel for the corporate Respondent asked Counsel for the Complainant when this accident had occurred. The accident had occurred in January of 1994, some eleven months prior to the hearing.

The hearing continued by conference call with all Counsel, Mr. Patel and Mr. Jones, on February 8, 1995, to set further dates to hear the case on the merits. Dates had not been set at the last adjournment, November 24, 1994, because it wasn't clear when Mr. Patel would be well

enough to go forward with the hearing. On February 8, 1995, Counsel for the Respondent made submissions that there had been considerable delay in hearing the case and that further delay would prejudice the Respondent corporation from getting a fair hearing. Recognizing the delay and the adjournments that had occurred in this case, the Board warned Mr. Patel that if there was still some medical problem or reason that he was unable to go forward with the hearing he should indicate that by February 28, 1995. This, of course, did not preclude an adjournment for some emergency that occurred at the last minute.

On February 28, 1995, Counsel for the Complainant wrote to the Board and requested an extension of one week. No objection to the extension was made by the Respondents and the Board indicated that the extension was allowed. The letter said that Counsel was "awaiting receipt of the medical report from Dr. Giaccone to advise ... whether Mr. Patel will be medically fit to proceed with the hearing in April 1995 ..." On March 16, 1995, Counsel for Mr. Patel wrote to the Board requesting an adjournment of the date in April on the basis that his client was unable to go forward because of medical reasons. Dr. Giaccone's letter dated March 3, 1995, stated that, "Mr. Patel's perception of his symptoms had not changed, but as a neurologist, there is insufficient evidence to support that he is unfit neurologically to testify."

On March 23, 1995, at the request of the parties, the Board convened by conference call to hear submissions on the request for the adjournment. The Respondent corporation strenuously opposed a further delay in proceeding to a hearing on the merits of this case. After hearing those submissions, the Board denied the motion for an adjournment, given the medical evidence did not support the request.

On April 18, 1995, the first day of the third attempt to hear the case on the merits, the Complainant made a motion for another adjournment arguing that he was medically unfit to testify. Counsel for the Complainant submitted the medical opinion of Dr. Bencze that given Mr. Patel's reported symptoms it would be best if he didn't testify.

The letter in no way confirmed that Mr. Patel was ill. Rather, it stated what Mr. Patel had reported to the doctor. Mr. Patel had reported certain symptoms: coughing up blood in his sputum, and a cough that was irritated by talking. The letter of Dr. Bencze was dated April 16, 1995, the last working day before the hearing was to begin on April 18, 1995. This Board denied the request for adjournment and assured Mr. Patel that any accommodation that might assist him in giving his evidence would be considered. If it was necessary to shorten the day or take frequent breaks the Board was willing to do so.

Opening statements were then made and Mr. Patel was sworn in order to give his evidence. In giving his evidence, Mr. Patel indicated that his coughing was such that if he talked during the day he would cough up blood in the evening, even though no coughing was apparent while he was talking during the day. He stated that his illness was very serious and that he could even suffer a stroke because of it. He said he had a fever and he could taste blood in his mouth. He stated that it was an a life-threatening illness and indicated to the Board that he was of the view that the Board didn't understand the seriousness of the affliction. The Board again reiterated the desire to accommodate Mr. Patel.

Mr. Patel spent the greater part of that first morning of the hearing arguing in his evidence that he was too unwell to speak. He was clearly unhappy with the Board for not granting

another adjournment. Although he spoke at some length throughout the morning he never once coughed.

At one point in Mr. Patel's evidence he was being asked about his medical history and Commission Counsel referred to the car accident which occurred in January of 1994. He did not want to answer any questions. The Board directed him to answer. Mr. Patel asked whether the evidence given at the hearing could be used against him in another proceeding. Mr. Patel said he was involved in litigation regarding the accident and he did not want to talk about it. After saying this, he refused to testify any further on the grounds that he was too ill to proceed. Since the Complainant refused to testify any further that day the hearing was adjourned.

The next morning Counsel for the Complainant renewed his motion to adjourn on the grounds that Mr. Patel was too ill to proceed. The hearing began with evidence from Dr. Bencze regarding Mr. Patel's medical condition. Mr. Patel had been under Dr. Bencze's care for approximately six months. In summary, the evidence of Dr. Bencze was that he had no medical evidence that Mr. Patel was ill but, given what his patient had described, he had to eliminate, through a series of tests, the diseases that might cause the spitting up of blood in the sputum. A chest x-ray revealed no abnormality, so he had thus set up a CAT scan and a bronchoscopy for Mr. Patel some time last fall. Mr. Patel did not attend at the appointed time for the CAT scan or the bronchoscopy. Mr. Patel told his doctor that he was afraid of being exposed to x-rays. Dr. Bencze told the Board that he reassured his patient and another CAT scan was set up. Again Mr. Patel did not attend for that test. Nor did Mr. Patel cancel the appointment.

Dr. Bencze also said that it would not be possible for a patient to speak all day and then cough up blood in the evening as a result of the talking during the day. Dr. Bencze indicated that the spitting up of blood would occur with coughing and if there was such a problem we would see it immediately.

On cross-examination by the Respondent's Counsel, Dr. Bencze said that Mr. Patel had never told him of having a fever, that tasting blood might be possible after a person had actually spat up some blood, but that would be only when it would occur. Dr. Bencze also emphasized that it is rare for him to observe his patients coughing up blood. The doctor also concluded that, given the potential serious illnesses that could be causing the symptom of spitting up blood, he could not recommend that for Mr. Patel go forward with the hearing, until it was clear what was causing the coughing.

Given the medical evidence of Dr. Bencze, and given the Complainant's refusal to attempt to go forward, even with accommodation, the Board adjourned the hearing on the merits for the third time.

CORPORATE RESPONDENT'S SUBMISSIONS ON THE MOTION TO DISMISS FOR ABUSE OF PROCESS

In summary, Counsel for the corporate Respondents argues that this Board has the power to dismiss this case for abuse of process taking all the facts of this case into consideration. Counsel for the corporate Respondent submitted that the grounds for dismissal are: 1) the Complainant has shown a manifest disrespect bordering on contempt for the Board of Inquiry and its proceedings; 2) the Complainant has refused to testify, even when warned by the Board that continued refusal could lead to the dismissal of his complaint; 3) that the Complainant has been guilty of an inordinant and inexcusable delay giving rise to a substantial risk that it will not be possible ever to have a hearing; 4) the Complainant has been guilty of delay which is likely to cause prejudice to the corporate Respondent; and 5) the Complainant has deliberately misled the Board of Inquiry as to his health.

PERSONAL RESPONDENT'S SUBMISSIONS

The personal Respondent, who has been unrepresented throughout these proceedings by counsel, adopted the reasoning and submissions made on behalf of the corporate Respondent. On several occasions throughout the attempts to hear this case and after adjournments, the personal Respondent indicated to this Board that he had suffered personal hardship getting the time off work to attend the hearings. Further, he noted for the record that on April 19, 1995, he missed his grandmother's funeral in order to attend a hearing because of his "anxiousness to resolve this matter."

THE COMPLAINANT'S SUBMISSION ON THE ABUSE OF PROCESS MOTION

In summary, counsel for the Complainant argued that the Respondents had put forward no evidence of actual prejudice of such a kind or degree that would make it unlikely for them to receive a fair hearing before this Board of Inquiry. Counsel argued further that it was in the public's interest for this Board to determine the issues raised in the complaint and further, that by dismissing the proceedings before a full hearing, it would cause irreparable and unreversable harm to the Complainant.

Counsel argued further that there can be no abuse of process where a complainant exercises his right of retaining legal counsel. It was submitted that there could be no abuse of process where a complainant requests an adjournment on the basis that he is physically unwell and this is substantiated by a medical opinion. Counsel for the Complainant argued that since this Board had granted the three adjournments on the first hearing days before the matter was to be heard on the merits that there could be no complaint of abuse of process.

Finally, Counsel argued that the delay in the proceedings could not be characterized as vexatious or oppressive so as to amount to an abuse of process.

COMMISSION'S SUBMISSIONS ON THE ABUSE OF PROCESS MOTION

The Commission took no position on the abuse of process motion. However, Commission Counsel did make submissions which were of great assistance so that this Board would not make a decision on incorrect assertions of fact and law.

Commission Counsel stated that case law on the question of what amounts to an abuse of process at a Board of Inquiry is sparse. There is no case that is similar to the one that is before this Board. In commenting about Respondent's Counsel argument that Mr. Patel's conduct amounted to contempt because he disobeyed the Board's order, she argued, amongst other things, that Mr. Patel sincerely believed that his health was being jeopardized and, therefore, without commenting on whether it was rightly held or not she argued that this conduct could not be characterized as contemptuous. Further, she argued that there was no evidence to believe that Mr. Patel was deliberately misleading the Board regarding the state of his health. Again, she pointed to his sincere belief that he was truly ill.

In referring to the legal argument by Counsel for the Respondent corporation, Commission Counsel argued that the Board's jurisdiction to dismiss or stay a complaint for delay arises from its jurisdiction to prevent an abuse of its process, but that delay was only one possible ground for an abuse of process motion.

THE DECISION

Boards of Inquiry have a broad jurisdiction to prevent an abuse of process pursuant to sub-section 23(1) of the Statutory Powers and Procedures Act, R.S.O. 1990, c.S. 22.

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

The provision has been held to empower a Board to dismiss a complaint so as to prevent abuse of process in appropriate circumstances. Gohm v. Domtar Inc. (#1) (1989), 10 C.H.R.R. D/5968 at D/5970 (Ontario B.O.I.); Shreve v. Windsor (City) (#2), (1993), 18 C.H.R.R. D/363 (Ont.

B.O.I.) at B/374. Most of the Board of Inquiry cases on abuse of process deal with the issue of delay. The argument is that great delay in getting to a hearing leads to an abuse of process. But this is not the usual case of delay. Thus the submissions of Counsel for the complainant as they relate to delay are not pertinent.

The Respondents' Counsel referred to Pamour Inc. (1993), 15 Admin. L.R. (2d) 201 at 206-207, a decision on the Ontario Environmental Appeal Board, which held that an administrative tribunal has the discretion under the Statutory Powers and Procedures Act to make orders of any kind that it thinks is proper to avoid or prevent an abuse of process. In analysing the power the Appeal Board held:

> Not every action that impedes the progress of a tribunal's proceedings or causes unreasonable or excessive cost or hardship to a party is an abuse of process. An abuse of process will be found only in the "most exceptional circumstances" (R. v. Abitibi Paper Co. (1979), 47 C.C.C. (2d) 487 at p. 496 (Ont. CA.). It is usually conduct which would "violate those principles of fundamental justice which underlie the community's sense of fair play and decency" or which constitutes "oppressive or vexatious proceedings" (R. v. Jewitt (1985), 21 C.C.C. (3d) 7, 20 D.L.R. (4th) 651 (S.C.C.)). The power to declare something an abuse of process and take steps to prevent it is "a power which can only be exercised in 'the clearest of cases'." (Jewitt above, at p. 14)

Pamour and the cases cited above suggest the test which should be applied for deciding whether or not a case should be dismissed for abuse of process is whether, considering all the facts of the case and the community's sense of fair play and decency, proceeding with the hearing would amount to an abuse of process, or be vexatious or oppressive to the respondent. See also Bennett v. British Columbia (Securities Commission) (1991), 82 D.L.R. (4th) 129 (B.C.S.C.), affirmed 69 B.C.L.R. (2d) 171, leave to appeal refused, (1992) 6 W.W.R. (S.C.C.). In Shreve,

the Board of Inquiry dismissed a complaint because considering all the factors taken together it would have been an abuse of process to continue with the hearing.

The issue before me, then, is whether the facts taken together meet the exceptional circumstances that justify a Board dismissing a complaint to prevent an abuse of process. I agree with Commission Counsel that Mr. Patel was not contemptuous of the Board. Nor am I convinced that he was attempting to deliberately mislead the Board regarding his health. Nevertheless, I am of the view that, however motivated, Mr. Patel's conduct in requesting last minute adjournments in September 1994, November 1994, and April 1995, when in every case there was no justification for the adjournment being made on the first day set for hearing showed a complete disregard for the process.

Mr. Patel showed no respect for the process when he did not notify this Board in a timely fashion that it was unnecessary to proceed on September 30, 1994, a date set specifically so that Mr. Patel's counsel could make submissions on the disclosure of certain documents further to his objections in June 1994.

More disturbing evidence of Mr. Patel's complete lack of care was that after an adjournment for the personal Respondent on November 17 and 18, Mr. Patel agreed to set new dates on December 1-2, and yet five days later, on November 23, his Counsel notified the Board of Inquiry office that there "might" be a request for an adjournment based on health reasons the next day. When the case resumed on the merits on November 24, the first order of business was a motion to adjourn on the grounds that the Complainant was too unwell to go forward. On reviewing the medical evidence that Mr. Patel was suffering from short-term memory loss,

confusion, difficulty in concentrating, although described as mild by the doctor, this Board felt compelled to grant the adjournment. The Commission was not in a position to go forward with its case since Mr. Patel was the key witness, and his evidence had to be lead first.

However, the medical problem was not a new one, having arisen out of a "closed head injury" occurring because of a car accident in January 1994. There was no reason for the Complainant not to have brought the situation to the Board's attention months before. Further reasons have been advanced to explain why Mr. Patel agreed to set dates five days before he asked for an adjournment.

Further evidence of Mr. Patel's complete lack of regard for the process occurred when he agreed again to dates being set in April and again asked for a last minute adjournment, even though, in this instance, it was a problem for which he had seen a specialist for approximately eight months. Neither Mr. Patel nor his Counsel made reference during the February 8th conference call to the possibility that Mr. Patel was currently medically unfit and that dates should not be set. Thus, once again, dates were set to hear this case on the merits, this time for the third time. Mr. Patel clearly agreed to setting these dates.

It is important to point out that no one forced Mr. Patel to set these dates, and had he indicated that there was an ongoing problem with his health this Board would not have set new dates.

It is a very serious matter to be accused of racial discrimination. The Respondent corporation and the personal Respondent, from the beginning of the process, have expressed concern about the delay in getting to a hearing and the need to have an opportunity to defend

themselves against serious allegations. The purpose of human rights legislation is not to be punitive to the person who may have breached the Code. It becomes punitive when the Respondents are not given an opportunity for a fair hearing. The fundamental duty of a Board is to ensure that all the parties get a fair hearing. But when one party thwarts the process by continually asking for last minute adjournments, it is not possible.

The Corporate Respondent's Counsel argued that the financial loss to the Respondent corporation was considerable. While in contrast, the Complainant was on a legal aid certificate and, therefore, was not put to the same cost. The cost to the Respondent Corporation of preparing a fourth time to hear the case might not, in and of itself, amount to a process which is vexatious and oppressive to the Respondents. Three adjournments on the first day of hearing a case on the merits, if granted on an emergency basis might not alone lead a Board to conclude that it would be an abuse to go forward a fourth time. But in this case there was no justification for requesting the adjournments of September and November 1994, and April 1995, at the last-minute.

This is clearly an unusual case. Most Boards have been faced with a motion to dismiss to prevent abuse because, allegedly, the Commission has done something improper. Boards are reluctant to dismiss a complaint except in the clearest of cases and, thereby, deny the Complainant an opportunity to prove their case. But in this case it is clearly the Complainant himself who is at fault. It was clear to this Board that his Counsel was not informed in advance of the two last-minute medical opinions presented to this Board to support requests for adjournment.

Thus I am of the opinion that continuance of this proceeding would amount to an abuse of the Board's process and that it would be vexatious and oppressive to both Respondents to require them to prepare to defend this case for a fourth time. Because I am granting the Respondents' motion to dismiss the complaint to prevent an abuse of process, there is no reason to address the motions for delay and jurisdiction.

ORDER

For the reasons noted above, I grant the Respondents' motion to dismiss the complaint to prevent an abuse of process and order that the complaint is hereby dismissed.

D.J.D. Leighton, Board of Inquiry

12-21-95